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# The Proposed North Dakota Rules of Civil Procedure

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# THE PROPOSED NORTH DAKOTA RULES OF CIVIL PROCEDURE

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IN THE preceding article there appears a plea for the adoption of the proposed North Dakota Rules of Civil Procedure[1] by one of the nation's most distinguished authorities on pleading and practice. Judge Holtzoff's standing as an expert on the Federal Rules of Civil Procedure — from which the North Dakota Rules have been largely derived — is attested by the fact he is co-author of a work on them which is considered definitive in its field. Undoubtedly it is a work of supererogation to publish two papers on this subject in the same issue of the *North Dakota Law Review* when one of them bears such distinguished authorship.

Nevertheless the subject involved is one of such importance and has aroused so much professional interest that possibly two treatments of it are permissible, particularly when the method of analysis differs. This paper is an attempt to explore the background and significance of the proposed North Dakota Rules on a rule-by-rule basis; it is hoped that members of the profession will find it of continuing usefulness in applying the new rules when — and if — they are adopted.

As of this writing, the largest single question involving the proposed rules centers about that word *if*. The rules have been submitted to the North Dakota Supreme Court but have not as yet been finally approved. It is undoubtedly conservative to suggest that whatever action the Court takes with respect to them will constitute its most significant decision for 1956.

When one pauses to reflect on the extent to which substantive law bears the imprint of procedural distinctions, the true importance of what is involved becomes evident. It is a truism to remark that procedural law has a pervasive effect upon substantive law much greater than is sometimes realized. Hence it sometimes happens that the consequences of procedural change are felt in unxpected ways.

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1. The North Dakota Rules of Civil Procedure will be cited hereinafter in this discussion as "N.D.R.Civ.P." The text version of the rules used in preparing this discussion has been derived from the pamphlet "Proposed Rules of Civil Procedure for the District Courts of North Dakota" published by the West Publishing Company as a service to the profession, and from the supplement amending this version filed with the Supreme Court of North Dakota by the Joint Committee of the Judicial Council and State Bar Association on June 17, 1955.

Certainly it is true that procedural provisions which have found their way into the body of substantive law have a tendency to persist in their influence much longer than might be expected. This is readily illustrated by the persistence of rules based on the formulary writs which served as a foundation for actions in the early days of the common law. The technical and arbitrary classifications based upon common law forms of action have long since been formally erased from the statute books, and yet as recently as 1936 it was possible for Maitland to write, with obvious justification, that "forms of action we have buried, but they still rule us from their graves."[2] Presumably if the new rules are adopted, something of the sort will also be true of the provisions of the Field Code of Civil Procedure, our ground rules for civil actions since 1868.[3] One must understand wherein the Field Code proved deficient in order to appreciate the reasons underlying the various provisions of the proposed North Dakota Rules of Civil Procedure.[4]

The truth is that procedural law has a tendency to shape substantive rights because attorneys and judges necessarily do their thinking about questions of substance within the framework of reference furnished by the body of law which governs the enforcement and application of remedies. In practice the question of what remedial rights accompany a cause of action created by the breach of a primary right,[5] the question of who may sue and who may be sued, the necessity of estimating the quantum of evidence requisite for success — all matters possessing a procedural aspect — inevitably affect the outcome of lawsuits.[6] It could scarcely be otherwise.

This illustrates the significance of the proposal to change from one set of rules to another. The proposed replacement of the Field Code of Civil Procedure by the new North Dakota Rules of Civil Procedure is the first thorough overhauling of remedial law in this jurisdiction since the days of territorial status. What results it might have furnishes ground for interesting speculation. The federal

2. Maitland, Forms of Action 296 (1936).

3. The version then adopted was subsequently amended to conform to the California revisions of the Field Code of Civil Procedure occurring in 1872. See Bonde v. Stern, 73 N.D. 273, 280-81, 14 N.W.2d 249, 251-52 (1944), for discussion of the intent underlying the adoption of the Field Code.

4. One particular line of attack upon the Field Code has been the objection that its provisions for joinder of parties and joinder of causes of actions ("claims" under the new rules) have been antiquated and over-technical. A discussion of this aspect of the new rules will appear in the following issue of the North Dakota Law Review.

5. For an analysis of the distinction between primary, secondary, and procedural rights, see 1 Beale, A Treatise on the Conflict of Laws 66-86 (1935).

6. Since these things bear on the all-important question of what the court in a given case will ultimately do, no lawyer can disregard them in advising his client. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897).

courts adopted these rules precisely at the time the Supreme Court of the United States took away their power to independently interpret the substantive law of the states; in 1938, the year the Federal Rules of Civil Procedure came into force, the Court in *Erie Ry. v. Tompkins*[7] wiped out the bulk of the federal common law applicable to the states. Hence substantive state law has not felt the impact of these new procedural rules as much as might have been expected.

But if the federal rules, with their liberalized provisions regarding joinder of parties and claims and their third-party procedures, come into effect in this state, it is readily conceivable that the North Dakota courts may in time develop some new substantive principles out of them. For this reason it seems fair to say that no question of greater long-range potentialities has arisen in the legal system of this jurisdiction since the Field Code itelf was adopted.

The precise impact of the new rules upon litigation in this state can scarcely be forecast in detail and this paper does not attempt to do so. What is planned is simply an attempt to explore some of the implications of the change and to compare the operation of the new rules with the case law and the statutes they replace, in an effort to ascertain how many of the old rules and precedents will retain validity and what benefits will be derived from the adoption of the new rules.

For this purpose, an examination of the course by which the new rules have been developed is indicated.

## THE BACKGROUND OF THE NEW RULES

Since the Federal Rules of Civil Procedure became operative in the federal court system in 1938, there has been in North Dakota a steadily-increasing group of practitioners and judges advocating their adoption here.[8] The adoption of modernized rules in the federal judiciary system had been preceded by general recognition of the fact that the Congress, preoccupied with other matters, had neither the time nor inclination to prescribe an improved procedure for the courts.[9] In the end, therefore, the Federal Rules came into

7. 304 U.S. 64 (1938).

8. As illustrated by P. W. Lanier Sr., *Should North Dakota Adopt the Federal Rules of Civil Procedure?*, 26 N.D. Bar Briefs 153 (1950).

9. Congress had never laid down a specific code of procedure to be followed by the courts, and procedure in them was regulated at the time of the adoption of the Federal Rules of Civil Procedure by the Practice Conformity Act, 17 Stat. 197 (1872), which required federal courts to conform as nearly as practicable to procedure in the state courts in trying actions at law, and the Federal Equity Rules of 1912. Much of the opposition of opponents of a unified set of rules for the federal courts was motivated by their fear "that the rather simplified code practice of the western states might be superseded by the in-

being through the exercise of the rule-making power of the Supreme Court of the United States — a power recognized, of course, by a statute enacted only after a long and difficult legislative struggle.

Moved by this example of what might be accomplished, the North Dakota Legislative Assembly in 1941 enacted a measure vesting a rule-making authority in the Supreme Court of this state.[10] It is clear that before that enactment the Court possessed a limited rule-making power in any event, since it is an independent and equal branch of the state government with power to regulate its own affairs and a supervisory jurisdiction over the business of its subordinate courts.[11] It had exercised its rule-making power in the past to prescribe rules for the conduct of its own affairs and also to govern the conduct of litigation in the district courts in areas not covered by statute.[12] But from 1941 until the time of this writing the broadened authority which the Legislative Assembly gave it has remained unexercised; the Court has thus far made no move toward a change in the existing code provisions[13] regarding procedure.

Explanations for this reluctance to move are not difficult to suggest. For one thing, in the hands of the Court the Field Code of Civil Procedure has served this state extremely well, and a sense of tradition and stability has come to surround it. Most of the problems connected with it have been passed upon by the Court and the judges of the state are all thoroughly familiar with its principles. It is also possible that the members of the Court felt they were being asked to undertake an essentially legislative task; a majority of

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volved metropolitan practice, which had unfortunately developed in New York City under later emendations of the code." Clark, Code Pleading 35 (2d ed. 1947). For this reason the late Senator Walsh of Montana was a vigorous opponent of the enabling act which permitted the adoption of the Federal Rules of Civil Procedure, and it was only after his death removed him from the chairmanship of the Senate Judiciary Committee that the legislation passed. For the story, see 1 Barron and Holtzoff, Federal Practice and Procedure §4 (1950); Clark, Code Pleading 34 *et seq.* (2d ed. 1948).

10. N.D. Laws 1941, c. 238.

11. It has often been argued that it is within the authority of the courts to lay down their own rules of procedure without any legislative mandate to that effect whatever. This was, for instance, the position of John H. Wigmore, who believed that procedural statutes violated the principle of separation of powers. See Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 Ill. L. Rev. 276 (1928). The more accurate view seems to be otherwise, as evidenced by the scholarly and thoroughly documented research set forth in Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 Wash. U. L. Q. 459 (1937). Professor Williams' conclusion is that the courts may lay down sub-statutory rules, i.e., rules not in conflict with statutory provisions, in the absence of legislative authority; but that a legislative mandate is necessary before the rule-making power can be used to supersede statutory provisions.

12. See Volume 41, *North Dakota Reports*, 705 *et seq.*

13. Under the rule-making authority granted the North Dakota Supreme Court by the Legislative Assembly, the fact a rule of procedure is incorporated in a statute does not withdraw it from the Court's power of alteration or amendment. N.D. Rev. Code §27-0209 (1943). The rule-making authority in this state is what Williams, *supra note* 11 at 467, would call "super-statutory."

the justices felt that way, it will be remembered, when the Legislative Assembly placed the Committee on Code Revision under their jurisdiction.[14] When the matter is considered in perspective it is not at all surprising that a Court with a fine tradition of procedural effectiveness should feel no sense of urgency when asked to depart from a settled path.

But while the Court thus made haste slowly, many of the provisions of the Federal Rules nevertheless found their way into North Dakota law by legislative action. In 1943 the Legislative Assembly adopted the pre-trial conference of the Federal Rules in its entirety, acting on the recommendation of a committee under the leadership of Mr. Justice Grimson.[15] Similarly, the Revisors responsible for the preparation of the North Dakota Revised Code of 1943 — who were, as noted above, under the authority of the Court — found it desirable to incorporate many of the federal procedures into the North Dakota statutory law.[16]

And as the Federal Rules proved themselves successful, the body of opinion in favor of a shift to them continued to grow. Late in 1953 a committee of the State Bar Association commenced a study of the Federal and Minnesota Rules of Civil Procedure[17] for the purpose of determining what would be involved in a change in this state.[18] At the same time a committee of the North Dakota Judicial Council was engaged in a similar study.[19] The activities of these committees resulted eventually in the formation of an eleven-member joint committee composed of six representatives of the State Bar Association of North Dakota and five representatives of the North Dakota Judicial Council which was charged with the function of drafting a new set of rules for presentation to the Court.[20]

On December 15, 1954, the Joint Committee presented a draft of

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14. State *ex rel.* Mason v. Baker, 69 N.D. 488, 288 N.W. 202 (1939).

15. N.D. Laws 1943, c. 216, a measure presently embodied in the North Dakota Revised Code of 1943 as chapter 28-11. The operation of pre-trial conferences in this state has been thoroughly covered by Mr. Justice Grimson in a survey conducted since that time. See Grimson, *A Progress Report on Pre-Trial Conferences in North Dakota,* 30 N.Dak. L. Rev. 85 (1954).

16. *E.g.,* N.D. Rev. Code §§28-0511, 28-0720, 28-0806, 28-0912, 28-1404, 28-1409, 28-1502, 28-1503, 28-1509 and 28-1510 (1943).

17. The Minnesota Rules of Civil Procedure have been of course, derived from the Federal Rules.

18. See Report of the Rules of Civil Procedure Committee to the State Bar Association of North Dakota, 30 N.Dak.L.Rev. 345 *et seq.* (1954).

19. *Ibid.*

20. In addition to Mr. Frank F. Jestrab, Chairman, the committee was composed of Judge Eugene A. Burdick, Mr. E. T. Conmy, Mr. Carroll E. Day, Mr. Clyde Duffy, Judge A. J. Gronna, Mr. Roy A. Ilvedson, Mr. H. A. Mackoff, Mr. Herbert G. Nilles, Mr. Norman G. Tenneson, and Dean O. H. Thormodsgard of the University of North Dakota School of Law.

the new rules to the Court.[21] On March 16, 1955, the Court entered an order directing the commencement of proceedings necessary to the adoption of the rules.[22] In the hearings which followed it proved necessary to formulate a number of amendments, something accomplished by a supplemental report submitted to the Court on June 17, 1955.[23] There the matter has rested since that time.

## GENERAL COMMENTS

A few words of general appraisal may well precede specific discussion of the new rules. They represent, it is submitted, not a revolution against Field Code procedure but an evolution in it. Eminent authority has pointed out that the Federal Rules of Civil Procedure benefitted substantially from Field Code principles in their original drafting;[24] hence the adoption of the new rules would not represent a departure from the procedural heritage of this state so much as an enrichment of it.

One noteworthy characteristic of the new rules is their brevity and compactness. There are only 79 separate rules and several of these may be considered virtually formal. Yet the rules supersede a total of 183 statutory provisions, thereby eliminating a very considerable amount of excess wordage as well as simplifying much statutory language.

The rules are divided into ten subdivisions. These are (1) Scope of Rules — One Form of Action; (2) Commencement of Action; Service of Process, Pleadings, Motions and Orders; (3) Pleadings and Motions; (4) Parties; (5) Depositions and Discovery; (6) Trials; (7) Judgment; (8) Provisional and Final Remedies and Special Proceedings; (9) Appeals; (10) District Courts and Clerks.

## SUGGESTED ADVANTAGES

At least seven advantages have been suggested as following the adoption of the new rules. These are as follows:

1. They will permit greater simplicity in pleading.

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21. See Proposed Rules of Civil Procedure for the District Courts of North Dakota 7 (West Publishing Co. 1955).
22. *Id.* at 8.
23. This is not available in printed form. The proposed original version and the amended version of the rules involved are indicated where appropriate in the text of this discussion.
24. "There can be no question but that they (the Federal Rules of Civil Procedure) represent a present-day interpretation and execution of what are at bottom of Field principles." Clark, *Code Pleading and Practice Today,* in David Dudley Field Centenary Essays 64 (1949).

2. They eliminate the element of surprise from actions as much as possible through their extensive discovery procedures.

3. They will permit resolution of all outstanding issues between litigants in one proceeding because of the liberalized provisions governing the union of claims in a single proceeding.

4. They will permit controversies involving numerous parties to be resolved in a single proceeding because of their liberalized provisions governing joinder of parties plaintiff and defendant.

5. They will permit controversies involving contingent liabilities — the situation where is A may recover from B, B may recover from C — to be settled in a single action because of the third-party plaintiff and third-party defendant procedures they incorporate.

6. Their adoption would make procedure in the state and federal courts as uniform as possible, thus keeping the attorney who is unfamiliar with the federal courts on ground which he knows.

7. The procedure of their adoption is such as to allow them to be kept continuously up to date, since every improvement in the Federal Rules will be considered by the Court for adoption in North Dakota.

## SUGGESTED DISADVANTAGES

The disadvantages which might be suggested in connection with the rules may be listed as follows:

1. The Field Code of Civil Procedure is a known and familiar body of law to the judges and attorneys and procedure here has compared well with procedure elsewhere. Hence there is not the immediate and pressing necessity for change found in some other jurisdictions.

2. It would be necessary to discard some old and familiar terminology and concepts, e.g., "cause of action" and "demurrer," since the new rules do not employ them. This might cause confusion and uncertainty.

3. The North Dakota Supreme Court has interpreted the present statutes in a sufficient number of cases to supply a considerable background of precedent. The benefit of some of these interpretations would be lost.

4. Adopting the new rules would make work for judges and attorneys because it would be necessary to relearn much procedural law.

Undoubtedly both proponents and opponents of the new rules

will find numerous points of disagreement with the foregoing summaries of advantages and disadvantages. They represent simply the writer's condensation of arguments pro and con.

With these general comments it is possible to turn to an analysis of the rules themselves.

## I. SCOPE OF RULES — ONE FORM OF ACTION

> Rule 1. *Scope of Rules.* These rules govern the procedure in the district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.[25]

It will be noted that Rule 1 does two separate and distinct things. The first of these is to indicate the coverage of the new rules. The second is to indicate the spirit in which the rules should be construed and applied. The second sentence of Rule 1 has therefore been listed by the Joint Committee as superseding the so-called "trivial error" statute.

*A. Coverage of Rules.* The question of the scope of the proposed rules inevitably raises the question of the extent of the rule-making power of the Supreme Court itself. It is settled law that the rule-making power extends only to questions of procedure.[26] Hence the new rules do not govern matters of substance and must yield in the event they conflict with rules which the courts consider substantive.[27] To illustrate the sort of issue which might be litigated, note that Rule 35 allows parties to demand mental, physical, or blood examinations of adverse parties in appropriate lawsuits. Does this infringe a substantive right of personal privacy? The answer of the United States Supreme Court has been in the negative,[28] but of course this ruling is not binding on the courts of this jurisdiction, though of great persuasive force.[29]

The issue of whether a given rule has substantive aspects has sometimes been a thorny one in the federal courts for obvious

25. The superseded statutory provisions in N.D. Rev. Code §28-0742 (1943): "Trivial Defects in Pleading or Proceeding to be Disregarded. The court, in every stage of an action, shall disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party and no judgment shall be reversed or affected by reason of such error or defect."

26. 1 Barron and Holtzoff, Federal Practice and Procedure §138 (1950); 1 Moore, Federal Practice §1.03 (1938); Sullivan, A Treatise on the Federal Rules of Civil Procedure §7 g (1949).

27. "An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction; and the Act . . . authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants. . . ." United States v. Sherwood, 312 U.S. 584, 589-90 (1941).

28. Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

29. The issue is further explored under the discussion devoted to N.D.R.Civ.P. 35.

reasons. In cases involving diversity jurisdiction, the federal judges have been bound under the rule of *Erie Ry. v. Tompkins* to apply the substantive law of the state wherein they sit as interpreted and applied by the courts of that state. Their procedure, however, is naturally regulated by their own rules. It follows that they do not consider themselves bound by provisions of state law which are merely procedural;[30] and since they must themselves in any given case determine whether a specific rule of state law is procedural and therefore to be disregarded or substantive and hence binding, a large number of cases have turned on this issue in the federal courts. It is plain that the question cannot arise in this precise form in the state courts; but that the general question of whether a given rule has substantive aspects will on occasion be litigated seems obvious.

*B. Spirit of Rules.* The intention underlying the "trivial error" statute was to free the courts from the necessity of insisting upon literal compliance with procedural statutes in situations where a failure to follow them to the letter is non-prejudicial. Plainly enough, this purpose is carried forward by the second sentence of Rule 1. The precedents which have construed the "trivial error" statute must obviously be considered, therefore, as continuing to represent valid law. A representative group of these holding is appended in the margin.[31]

30. This is an intentionally over-simplified statement which deserves amplification in a footnote. The line which the federal courts draw between "substantive" and "procedural" state law is by no means a black and white one; the federal courts have come to recognize that many procedural statutes tend to have a greater or lesser degree of substantive importance. Hence in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), it was ruled that whether a state statute has been characterized as procedural or substantive, if it vitally affects the outcome of a diversity jurisdiction case it is to be followed by the federal courts. In Angel v. Bullington, 330 U.S. 183 (1947), the Supreme Court therefore required the application of a North Carolina statute even though the Supreme Court of North Carolina had held it to be procedural. See also Woods v. Inter-state Realty Co., 337 U.S. 535 (1949), which similarly disregards the substance-procedure dichotomy. It is impossible, therefore, to make a purely mechanical categorization; the question of whether a given state statute will be disregarded as "procedural" is governed essentially by that statute's impact upon the case before the federal court. See 26 N.D. Bar Briefs 306 (1950).

31. In James River National Bank v. Haas, 73 N.D. 383, 15 N.W.2d 442 (1944), a summons inadvertently captioned a district court action as being brought in the county court; the error was held immaterial where the accompanying complaint was correctly captioned. See also Barnes Amusement Co. v. District Court, 66 N.D. 727, 268 N.W. 897 (1936) (undated summons held valid where no substantial prejudice could be shown to result from lack of date); Nashua Savings Bank v. Lovejoy, 1 N.D. 211, 46 N.W. 411 (1890) (summons addressed to defendant A omitted name of defendant B, B having been personally served with a summons addressed to him and the complaint in the case embracing both defendants, held valid where no motion to require the complaint to conform to the summons had been made in the district court); Hilbish v. Asada, 19 N.D. 684, 125 N.W. 556 (1910) (affidavit for attachment used "plaintiff" where "defendant" should have appeared, held a trivial defect); Braaten v. Grabinski, 77 N.D. 422, 43 N.W.2d 38 (1950) (complaint alleged accident on June 8, evidence of plaintiff showed it to have been June 6, variance between pleading and proof held immaterial); Ward v. Gradin, 15 N.D. 649, 109 N.W. 57 (1906) (where answer of defendant in action of conversion denied plaintiff's ownership of the property involved in the present tense, and strictly construed merely denied plaintiff was the owner on the date of the answer, the

Rule 2. *One Form of Action.* There shall be one form of action to be known as "civil action."[32]

Rule 2 should be considered in connection with Rule 1. Read jointly, they preserve the two basic reforms of the Field Code of Civil Procedure, the union of law and equity and the abolition of forms of action. Rule 2 most certainly works no change whatever in the law of North Dakota, being simply a restatement of the prior statute; indeed, the notes of the advisory committee which drafted the Federal Rules of Civil Procedure in the first instance indicate that Rule 2 was in fact originally derived from the Field Code. [33]

Rule 2 does not cover certain types of special proceedings expressly withdrawn from the coverage of the rules, something also true of its predecessor, § 32-0109 of the North Dakota Revised Code of 1943. [34] Thus, for example, actions of certiorari [35] or mandamus [36] will not be governed by the new rules any more than such actions have been governed by the general provisions regulating civil actions in the past.

The North Dakota courts have repeatedly pointed out that the abolition of forms of action has no effect upon the substantive rights of litigants. Thus it does not confer a substantive right of action on a private citizen in a case where only the state itself has standing

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court held no error was committed in treating the answer as a full traverse of plaintiff's ownership); Braithwaite v. Power, 1 N.D. 455, 48 N.W. 35 (1891) (joint judgment against joint debtors A and B and the administrator of joint debtor C, attacked on basis of common law rule that representative of a deceased debtor could not be joined with surviving debtors in one action, held valid since defect was not prejudicial); State v. Van Horne, 71 N.D. 455, 2 N.W.2d 1 (1941) (erroneous admission of defendant's evidence held non-prejudicial where total case showed defendant entitled to judgment as a matter of law); Vidger Co. v. Great Northern Ry., 15 N.D. 501, 107 N.W. 1083 (1906) (admission of self-serving statement was trivial error where the fact in dispute was later established by undisputed evidence); Moe v. Kettwig, 68 N.W.2d 853 (N.D. 1955) (allegedly erroneous instruction held non-prejudicial where appellant failed to establish that jury might have returned a different verdict had the instruction not been given); Cohn v. Wyngarden, 48 N.D. 344, 184 N.W. 575 (1921) (fact juror overheard party to action conversing with his witness in improper fashion held a trivial defect where juror made affidavit he decided case on the evidence, since losing party himself caused the error). In Crane v. First National Bank, 26 N.D. 268, 144 N.W. 96 (1913), the winning party failed to file for record the judge's findings of fact, conclusions of law, and order for judgment prior to the expiration of the judge's term. It was held a new trial was necessary despite the trivial error statute, the court reasoning that a case is not concluded until the filing of the findings, conclusion and order, because the judge might change his opinion up to that time. Hence the majority felt the case had never been concluded and deemed a retrial necessary. There is a dissenting opinion.

32. The superseded statutory provision is N.D. Rev. Code §32-0109 (1943): "Civil Action; One Form; Plaintiff and Defendant Defined. There shall be in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action. In such action the party complaining shall be known as the plaintiff and the adverse party as the defendant."

33. 1 Barron & Holtzoff, Federal Practice and Procedure 257 (Rules Ed. 1950).

34. See N.D.R.Civ.P. 1, 81 (a).

35. For discussion of certiorari, see Crum, *The Writ of Certiorari in North Dakota*, 27 N.Dak.L.Rev. 271 (1951).

36. State *ex rel.* Dakota Hail Association v. Carry, 2 N.D. 36, 49 N.W. 164 (1891).

to be heard.[37] Nor does it create a right of action in a case where there simply has not been a breach of a primary substantive right.[38] Its principal effect stems from the greater flexibility in pleading it permits, since if the facts pleaded in a complaint show any right to relief at all the complaint has in the past been treated as sufficient, even if drafted on the wrong legal theory.[39] This plainly will remain the law.

The union of law and equity is of course merely a procedural one. They remain separate and distinct bodies of substantive doctine.[40] Thus it will certainly remain possible to plead an equitable defense to a legal cause of action,[41] to secure equitable relief in cases where the court has assumed jurisdiction at law,[42] and to obtain legal relief in actions commenced on the equity side of the court.[43] In short, these two rules do not alter the pre-existing law at all.

## II. COMMENCEMENT OF ACTIONS: SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

Rule 3. *Commencement of Action.* A civil action is commenced by the service of a summons.[44]

*A. Comparison with the Federal Rules.* North Dakota practice on the question of commencing actions varies sharply from procedure under the Federal Rules. In the federal courts civil actions are commenced by the filing of a complaint with the court.[45] In

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37. Wishek v. Becker, 10 N.D. 63, 84 N.W. 590 (1900).

38. "What was intended to be accomplished by the sweeping declaration that all distinctions should be destroyed was not any change in the substantive law, but merely an alteration in the manner of setting forth causes of action in the plaintiff's pleading. . . . True it is that the distinctions between actions, so far as the mode of setting forth the cause of action is concerned, have been done away with and now the facts are to be stated in every case alike. But whether the facts so alleged constitute any cause of action at all is to be determined by the substantive law, and this law has not been changed by the code." Corliss, C. J. in Black v. Minneapolis & Northern Elevator Co., 7 N.D. 129, 133, 73 N.W. 90, 91 (1897).

39. Hellebust v. Bonde, 42 N.D. 324, 172 N.W. 812 (1919) (complaint insufficient to state cause of action for fraud nevertheless good as pleading cause of action for money had and received); Rott v. Goehring, 33 N.D. 413, 157 N.W. 294 (1916) (whether complaint pleaded cause of action for alienation of affections and criminal conversation, or merely for alienation of affections, held immaterial; plaintiff was entitled to recover if facts pleaded showed any right to relief); Varnes v. Schwartz, 50 N.D. 511, 197 N.W. 129 (1924) *semble.*

40. Schafer v. Olson, 50 N.D. 1, 132 N.W. 645 (1921).

41. Shary v. Eszlinger, 45 N.D. 133, 176 N.W. 938 (1920); L. W. Wentzel Implement Co. v. State Finance Co., 63 N.W.2d 525 (N.D. 1954).

42. L. W. Wentzel Implement Co. v. State Finance Co., *supra* note 41; Burrows v. Paulson, 64 N.D. 557, 254 N.W. 471 (1934); Shary v. Eszlinger, *supra* note 41.

43. Burrows v. Paulson, *supra* note 42.

44. The superseded statutory provision is N.D. Rev. Code §28-0501 (1943): "Civil Action; How Commenced. Civil Action in the courts of this state shall be commenced by the service of a summons."

45. Fed. R. Civ. P. 3.

this jurisdiction an action may be commenced without the intervention of the court at all.[46]

While the federal practice has some attractive features, it is submitted that the action of the North Dakota committee in retaining the former rule has an extremely sound basis. The argument for the federal practice has been that greater certainty is attained with respect to the establishment of priorities[47] and tolling the statute of limitations and that the federal procedure makes the commencement of actions a matter of public record. The argument based on the statute of limitations and establishment of priorities does not appear sustainable as applied to this state. Section 28-0138 of the North Dakota Revised Code of 1943 halts the running of the statute of limitations when the summons is delivered to the sheriff and uses language which indicates the action would also be deemed to commence for purpose of priority of rights in the same manner. It thus deals with that problem very neatly.

The argument for the North Dakota rule is that it is simpler, faster, more convenient for practitioners, and less expensive because of its comparative informality. It is certainly less cumbersome than the federal procedure, since it is not necessary under the North Dakota practice to have the summons served by an official. Similarly it is not necessary to have someone especially appointed for the purpose. Virtually anyone save a party in interest is competent to make personal service.[48] The question of whether to adopt the service of process or the filing of a complaint as the starting point of an action was much debated when the Federal Rules were drafted.[49] On balance it seems that the Advisory Committee which drafted the Federal Rules reached a conclusion possessing fewer advantages for the practitioner and the litigant than the Joint Committee reached for this state.

*B. Effect of Issuance of Summons.* For other purposes beside the tolling of the statute of limitations, actions are deemed to commence in this state before a summons is actually served. When a summons has been drawn and signed with the intent that it be served, the rule in this state is that it is deemed to have been "issued" even though it remains in the hands of the attorney.[50] Issuance alone

46. "Under civil procedure in this state an action may be instituted and relief sought without filing papers in the office of the clerk of court." Schaff v. Kennelly, 61 N.W.2d 538, 543 (N.D. 1953).
47. 1 Barron and Holtzoff, Federal Practice and Procedure §161 (Rules ed. 1950).
48. See N.D. Rev. Code §28-0619 (1943); N.D.R.C.P. 4 (c) (1).
49. See note 47, *supra*.
50. Johnson v. Engelhard, 45 N.D. 11, 176 N.W. 134 (1919); Smith v. Nicholson, 5 N.D. 426, 67 N.W. 296 (1896).

confers a qualified vitality upon the instrument and it will support proceedings of attachment[51] and garnishment.[52]

*C. Operation of the Statute of Limitations.* As noted above, one method of stopping the expiration of a statute of limitations is to place a summons in the hands of the sheriff for service. Another is to actually make service, since it is generally held that the statute of limitations stops running when service is made.[53] But one complicating aspect of this rule should be mentioned.

Statutes of limitation normally run only against *causes of action*[54] and the summons has nothing to do with these. It is used for the purpose of establishing jurisdiction. The nature of the cause of action involved in a case is most plainly not indicated by the summons at all; it is the complaint which establishes it. This situation creates a logical difficulty in those cases where the complaint is filed or served only after service of the summons. Quite evidently the cause of action established by the complaint is deemed to relate back to the time of service of process for purpose of determining when the statute of limitations becomes applicable.

But what happens when the process is served *before* a statute of limitations has run and the complaint is filed or amended to state a valid claim only *afterward?* The Supreme Court of New York has held that the complaint must also be served or filed prior to the expiration of the statutory period or the action will be barred notwithstanding the service of a summons.[55] It is similarly the general rule that an amendment to a complaint after the period of limitation has expired may not be used for the purpose of setting up a *new* cause of action, though it is perfectly permissible to aid one already pleaded.[56]

There appear to be no cases in North Dakota dealing specifically with this question[57] and the law in this respect must therefore be considered uncertain. Logically, however, the New York holding

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51. Cases cited note 50, *supra.*

52. Citizens State Bank v. Smeland, 48 N.D. 466, 184 N.W. 987 (1921); N.D. Rev. Code §32-0906 (1943). But see also N.D. Rev. Code §32-0909 (1943).

53. Hoegh v. Miller, 190 Iowa 557, 180 N.W. 653 (1920); Haack v. Pollei, 134 Minn. 78, 158 N.W. 908 (1916); Note, *Cause of Action and Amendments After the Statute of Limitations Has Run,* 22 Iowa L. Rev. 128, 134 (1936).

54. Statutes of limitations will operate against "claims," of course, under the new rules.

55. Moses v. Benjamin, 185 Misc. 50, 55 N.Y.S.2d 743 (Sup. Ct. 1945). *But cf.* Importers & Exporters Ins. Co. v. Farris, 181 Okla. 339, 73 P.2d 831 (1937).

56. Note, 22 Iowa L. Rev. 128 (1936).

57. In James River Nat. Bank v. Haas, 73 N.D. 374, 15 N.W.2d 442 (1944), the North Dakota Supreme Court permitted the amendment of a *summons* after the statute of limitations had run, relying in part on cases involving amendments of other pleadings, such as the complaint, in similar situations. This is as close as the court has come to considering the question so far as this research has disclosed.

is a sound one. If the nature of the case has not been indicated by a complaint prior to the expiration of the statutory period, the defendant has not been warned of the issues to be raised against him and has thus not had the opportunity to preserve his evidence which it is one of the aims of the statute to secure. On the other hand, where amendments are concerned it is traditional to follow a policy of liberality. The view which the commentators have approved is that if a complaint, though defective, informs a defendant of the general nature of the case against him, it may be amended after the period of the statute has run to state a valid case.[58]

*D. Effect of Summons as Fixing Venue.* The North Dakota Court held in *Dillage v. Lincoln National L. Ins. Co.*[59] that the proper venue of an action is determined as of the time the action is commenced by service of the summons. Hence a party later brought into the action by interpleader was not entitled to an order changing the venue as a matter of legal right. This case will presumably be of considerable importance in connection with the third-party proceedings contemplated by the new rules.[60]

Rule 4. *Process.*

(a) *Summons, Contents and Issuance.* The summons shall specify the venue of the court in which the action is brought, contain the title of the action specifying the names of the parties, and be directed to the defendant. It shall state the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. It shall be dated and subscribed by the plaintiff or his attorney, who shall add to his signature his post office address.[61]

It is safe to say that in common with the other rules thus far examined, Rule 4 (a) undertakes merely a restatement of previous practice. It should be read in connection with Rule 4 (h), allowing the amendment of process. It sometimes happens that errors creep into the contents of a summons and when this happens the question of amendability becomes very important.

The North Dakota Court has apparently been quite ready to permit amendments to even this fundamental instrument. In the

58. Note, 22 Iowa L. Rev. 128 (1936); Clark, Code Pleading §118 (2d ed. 1947). Judge Clark states that in all but a few jurisdictions "the amendment is allowed if it refers to the same general aggregate of operative facts upon which the original complaint was based."

59. 54 N.D. 312, 209 N.W. 656 (1926).

60. See the discussion under Rule 14.

61. The superseded statutory provisions are N.D. Rev. Code §§28-0502, 28-0503, 28-3001 (1934). Fed. R. Civ. P. 4 (a) is so different no point is served by comparison.

eyes of the Court it is quite evident that, as Justice Burr once remarked, "There is nothing sacrosanct about a summons."[62] It is, however, necessary that the instrument be jurisdictionally sufficient in the first instance, since if the summons is so defective as to be void, no lawsuit is commenced by its service and hence the courts lack jurisdiction to entertain any motions to amend in the first instance.[63]

Which portions of the summons are jurisdictional? At times the Court has by way of dictum seemed to state a strict requirement. "Our summons. . .must specify the court and county in which the action is brought, and thus advise the defendant in what court he is being sued. It must specify the names and parties to the action, so that the defendant may know that he is a party against whom the action is brought, and it must be subscribed by the plaintiff or his attorney, who is required to add to his signature his post office address, and thus advise the defendant who is seeking redress against him and where that person or his attorney may be found."[64]

An examination of the actual course of the decisions indicates that in some instances the requirements set forth above are not unvarying. Thus it has been held that where a summons inadvertently lists an action as being brought in the county instead of the district court, it may be amended as long as prejudice has not resulted.[65] In *Nashua Savings Bank v. Lovejoy*,[66] a summons served upon a defendant happened to omit the name of a co-defendant, such co-defendant having been personally served with a summons addressed to him; the complaint in the case embraced both defendants. The summons was upheld. The summons need not be dated to be valid.[67] Nor need it be personally signed by the attorney in his own handwriting; the name of the attorney typed by a clerk is sufficient so long as the attorney adopts it as his signature.[68] In cases where the complaint is not served with the summons both the code and the new rules concur in requiring the summons to state that the complaint is or will be filed with the clerk of court; but the omission of such statement is not jurisdiction-

62. James River Nat. Bank v. Haas, 73 N.D. 374, 381, 15 N.W.2d 442, 445 (1944).
63. Coman v. Williams, 78 N.D. 560, 50 N.W.2d 494 (1951); James River Nat. Bank v. Haas, *supra* note 62.
64. Coman v. Williams, 78 N.D. 560, 50 N.W.2d 494 (1951).
65. James River Nat. Bank v. Haas, 73 N.D. 374, 15 N.W.2d 442 (1944).
66. 1 N.D. 211, 46 N.W. 411 (1890).
67. Barnes Amusement Co. v. District Ct., 66 N.D. 727, 268 N.W. 897 (1936).
68. Hagen v. Gresby, 34 N.D. 349, 159 N.W. 3 (1916).

al error.[69] Whether a misstatement of the time within which an answer must be served, appearing in the summons, will invalidate it, is unsettled.[70] On principle it should not, because in many cases the code itself prescribes a form which misstates the time for preparing an answer.[71]

(b) *Summons Served with or Without Complaint.* A copy of the complaint need not be served with the summons. In such case the summons shall state that the complaint is or will be filed with the clerk of the district court in the county in which the action is commenced, and if the defendant within 20 days after service of the summons causes notice of appearance to be given and in person or by an attorney demands in writing a copy of the complaint, specifying a place within the state where it may be served, a copy thereof within 20 days thereafter must be served accordingly. If in such case the complaint is not filed with the clerk within 20 days after service of the summons the action will be deemed discontinued.[72]

This rule alters the time period for filing a complaint in those cases where the complaint is not served with the summons, shortening it from 30 to 20 days. Beyond that it makes no change in the law of this state. It should be read in connection with Rule 6 (e), which doubles the stated period when service is made by mail. As noted in the comment to Rule 4 (a), above, omission of the statement that the complaint is or will be filed with the clerk of court does not defeat the jurisdictional validity of the summons.

(c) *By Whom Served.* The summons may be served:

(1) Within the state by any person of legal age not a party to the action.

(2) In any other state, territory or foreign country, when authorized by these rules, service may be made in the same manner as if such service were made within the state, except that such service must be made by a resident or citizen of the State of North Dakota, or by a sheriff, deputy sheriff, constable, deputy constable or other officer having like powers and duties of the place in which service is made, or by an attorney, counselor-at-law, solicitor, advocate or barrister duly qualified to practice law in such place, or by an officer

69. See N.D.R.C.P. 4 (b), *infra;* N.D. Rev. Code §28-0504 (1943).

70. Chittenden & Eastman Co. v. Sell, 58 N.D. 664, 227 N.W. 188 (1929).

71. The form of summons contained in N.D. Rev. Code §28-0503 (1943) requires that an answer be served thirty days after service of the summons. "As a matter of fact, a recital in the summons that a copy of the answer must be served within thirty days after the service thereof would be inaccurate because the answer need only be served within thirty days after the service of the copy of the complaint." Barnes Amusement Co. v. District Ct., 66 N.D. 727, 734, 268 N.W. 897, 901 (1935). See also Murphy v. Missouri & Kansas Land & Loan Co., 22 N.D. 336, 133 N.W. 913 (1911).

72. The superseded statutory provisions are N.D. Rev. Code §§28-0504, 28-0505 (1943). Fed. R. Civ. P. 4 (b) is so different no point is served by comparison.

authorized by the laws of this state to take acknowledgements of deeds to be recorded in this state.[73]

Rule 4 (c) substantially revises the subject-matter of the statute it supersedes. Sub-paragraph (2) is new material dealing with a subject not previously covered by the code.[74] References to the service of process by the sheriff which appeared in the prior statute have been omitted, evidently on the theory the statutes make adequate provisions on these subjects elsewhere.[75]

The rule retains the basic policy that any person of legal age[76] is competent to serve a summons so long as that person is not a party to the action. May an attorney do so on behalf of his client? The answer is undoubtedly in the affirmative under the terms of this rule, but it would seem better policy not to do so. The question of whether valid service has been made can readily become a hotly contested issue in some actions and there is a provision in the Canons of Ethics to the effect that an attorney should not act as counsel for a party in a case where his testimony is needed for any but formal matters.[77]

In *Froling v. Farrar*[78] the Court ruled that service of a summons by a person who was not a formal party but could have readily been joined as a party plaintiff was invalid. In that case a husband and wife jointly operated a collection agency. An account was assigned to the wife for collection on behalf of the agency and the husband served the summons. The court described the husband as a real party in interest[79] and accordingly ruled that no jurisdiction over the defendant had been obtained.

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73. The superseded statutory provision is N.D. Rev. Code §28-0619 (1943). Fed. R. Civ. P. 4 (c) provides that service of process in federal courts shall be made by a marshal, deputy marshal, or someone especially appointed by the court for that purpose.

74. The code makes reference to personal service of process outside the state, N.D. Rev. Code §28-0624 (1943), but does not state who is entitled to make it. Presumptively any person authorized to make service under the law of the jurisdiction where the defendant may be found is entitled to do so. Certainly peace officers of the foreign jurisdiction have been competent agents for this purpose in the past. Kaull v. Johnson, 56 N.D. 563, 218 N.W. 606 (1928). This provision of the rules spells the matter out in detail for the first time.

75. *E.g.*, N.D. Rev. Code §§11-1507, 11-1512, 11-1513, 11-1514, 28-2606 (1943) (fees of sheriff).

76. This is, of course, 21 for males and 18 for females. N.D. Rev. Code §14-1001 (1943).

77. A.B.A. Canons of Professional Ethics 19, 27 N.Dak.L.Rev. 243, 250 (1951). Cases in which controversy has arisen over whether service of process was made are Baird v. Ellison, 70 N.D. 261, 293 N.W. 794 (1940); Odland v. O'Keeffe Implement Co., 59 N.D. 335, 229 N.W. 923 (1930); Marin v. Potter, 15 N.D. 284, 107 N.W. 970 (1906); and Yorke v. Yorke, 3 N.D. 343, 55 N.W. 1095 (1893). In none of these cases save *Yorke v. Yorke* did the attorney actually participate in the process of making service.

78. 77 N.D. 639, 44 N.W.2d 763 (1950).

79. Logically, of course, a holding that a person is a real party in interest means that the action *must* be brought in his name; the action was not so brought in the *Froling* case. It would seem to the writer that if a person qualifies as a permissive plaintiff, a service carried out by him would be invalid whether he technically qualified as a real party in interest or not.

Within the meaning of this rule, service by registered mail is not personal service, though an ingenious argument to this effect was adduced in an early case.[80]

(d) *Personal Service in the State.* Personal service[81] within the state shall be made as follows:

(1) Upon an individual over the age of 14 years, by delivering a copy of the summons to him personally or delivering a copy thereof at his dwelling house or usual place of abode in the presence of some person of suitable age and discretion then residing therein, or by delivering a copy of the summons to an agent authorized by appointment or by law to receive service of process.[82]

(2) Upon an individual under the age of 14 years, by delivering a copy of the summons to his guardian, if he has one within the state, and if not, then to his father or mother or other person having his care or control, or with whom he resides, or in whose service he is employed.[83]

(3) Upon an individual who has been judicially adjudged incompetent or for whom a guardian of his person or estate has been appointed in this state, by delivering a copy of the summons to him and a copy thereof to his guardian.[84]

(4) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by delivering a copy of the summons to an officer, director, superintendent or managing or general agent, or partner, or associate, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If the sheriff shall make return that no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons at any office of the domestic or foreign corporation, partnership or unincorporated association within this state with the person in charge of such office.[85]

(5) Upon a city, village, township, school district, park district, county or other public corporation, by delivering a

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80. Clyde v. Johnson, 4 N.D. 92, 58 N.W. 512 (1895). But see N.D.) R.C.P. 45 (c) as to subpoenas.

81. The superseded statutory provisions are N.D. Rev. Code §§28-0601, 28-0616 (1943), defining what constitutes personal service in this state. The language used differs considerably from that used in Fed. R. Civ. P. 4 (d).

82. The superseded statutory provision is N.D. Rev. Code §28-0610 (1943). The language used substantially follows that of Fed.R.Civ.P. 4 (d) (1), with the exception that the Federal Rules would classify a person as a minor if he were below the age of 21.

83. The superseded statutory provision is N.D. Rev. Code §28-0602 (1943). The language used differs from the Fed. R. Civ. P. 4 (d) (2), which refers the question of service upon minors and incompetents to state law.

84. The superseded statutory provision is N.D. Rev. Code §28-0603 (1943). See note 83, *supra*. The language of this rule substantially follows that of the code.

85. This rule supersedes N.D. Rev. Code §§28-0606, 28-0607, 28-0608, and 28-0609 (1943). It is a hybrid, derived from Fed. R. Civ. P. 4 (d) (4) and also, in part, from the superseded statutes. See the text discussion.

copy of the summons to any member of the governing board thereof.[86]

(6) Upon the state by delivering a copy of the summons to the governor or attorney general or an assistant attorney general and upon an agency of the state, such as the Bank of North Dakota or the State Mill and Elevator Association, by delivering a copy of the summons to the managing head of such agency or to the attorney general or an assistant attorney general.[87]

The six sub-sections of this rule deal with service of process upon individuals generally, minors, incompetents, business associations, municipal corporations and the state. In general the rule carries forward without substantial change a group of statutes which appear to have caused little conflict in most cases; in any event cases construing the meaning of the superseded statutes appear to involve, with one exception, comparatively minor problems.[88]

The exception involves personal service upon foreign corporations, a vexed problem in this as well as many other jurisdictions. Rule 4 (d) (4) supersedes four lengthy sections of the code dealing with service upon various types of foreign and domestic business associations and replaces them with a single paragraph noteworthy for its brevity and conciseness. At present the code provides several alternative methods of serving a foreign corporation. One of these is to deliver the summons to somone specifically authorized to receive service on behalf of the corporation,[89] such as the Secretary of State or the Insurance Commissioner. Another is to serve the summons upon one of certain enumerated officers of the foreign

86. The superseded statutory provision is N.D. Rev. Code §28-0604 (1943). The language of this rule is derived from the cited statute.

87. The superseded statutory provision is N.D. Rev. Code §28-0605 (1943). The language of this rule is derived from the cited statute.

88. There are few cases dealing with the question of what constitutes personal service. Phelps v. McCollam, 10 N.D. 536, 88 N.W. 292 (1901), holds that where a husband had left the state intending to live elsewhere permanently, the service of a summons naming him as a defendant upon his wife while the wife was staying temporarily with neighbors in this state did not confer jurisdiction, since the home of a man's neighbors is not his own "dwelling place" within the meaning of the statutes relating to personal service. Presumably this will continue to be the law under N.D.R.Civ.P. 4 (d) (1). No cases dealing with service of process on minors, incompetents, or municipal corporations have been found in the reports. Two cases have been unearthed dealing with service upon the state. In Company A v. State, 58 N.D. 66, 224 N.W. 661 (1929), service of process in an action against the state was not made on the governor or attorney general as required by the statute on the books at that time. With scant discussion, the court held the judgment in the action of no force or effect. In Bonniwell v. Flanders, 62 N.W.2d 25 (N.D. 1954), it was held that neither the Attorney General nor the State Highway Commissioner had authority to waive service of process upon them in the manner prescribed by statute for the purpose of allowing a litigant to have recourse from the Unsatisfied Judgment Fund.

89. Reference should be made to N.D. Rev. Code §10-1733 (1943) as well as to §§28-0607, 28-0608, and 28-0609. The first-cited provision remains in force and unaffected by the new rules, and provides an alternative method of service upon foreign corporations. Logically it would seem that it should be consolidated with the other provisions dealing with this subject.

corporation within the state,[90] but this is effective only when these officers are engaged in the transaction of business here on behalf of the corporation. A third method is also available. When one cannot find any of the enumerated officers within the state engaged in doing business for a foreign corporation, the code provides that one may make service of process on "any person. . . within this state acting as the agent of . . . such corporation"[91] — but only on the condition that the corporation possess property within this state or that the cause of action arose here. These three alternative methods are all preserved by Rule 4 (d) (4).

When service upon one who is merely an ordinary agent[92] is relied upon as conferring jurisdiction *in personam* over a foreign corporation, some constitutional issues arise centering about the due process clause of the Fourteenth Amendment. There are obvious hardships imposed on a foreign corporation when it is made subject to service in any jurisdiction where any agent it has may be located. In the past the rule has been that such service was valid only when the corporation was "present" within the jurisdiction where service was made.[93] The corporate "presence" — concededly a fiction[94] — was manifested by engaging in business within the state. Traditionally the corporation has been deemed "present" when its activities consist of solicitation of orders to be filled elsewhere plus some sort of additional activity.[95] In 1945 this position was modified by the Supreme Court of the United States, which imposed a different test for the determination of jurisdictional questions relating to foreign corporations.

As the law presently stands, the assertion of jurisdiction over a foreign corporation by a state does not depend upon the idea of "presence" but upon whether the corporation has carried on activities within the state of such a nature that the exercise of jurisdiction can be justified as "reasonable" by the constitutional

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90. These officials are the president, secretary, cashier, treasurer, any director, or a "managing agent." Service upon a "managing agent" should be distinguished from service upon an ordinary agent, such as a salesman. See Brown v. Chicago, M. & St. P. Ry., 12 N.D. 61, 95 N.W. 153 (1903); Bauer v. Union C. Life Ins. Co., 22 N.D. 435, 133 N.W. 988 (1911); Kluver v. Middlewest Grain Co., 44 N.D. 210, 173 N.W. 468 (1919).

91. N.D. Rev. Code §28-0608 (1943).

92. See note 90, *supra*.

93. Brevick v. Cunard S.S. Co., 63 N.D. 210, 247 N.W. 373 (1933); Wheeler v. Boyer Fire Apparatus Co., 63 N.D. 403, 248 N.W. 521 (1933); Ellsworth v. Martindale-Hubbell Law Directory, 65 N.D. 297, 258 N.W. 486 (1935); Anderson v. Page & Hill Homes, 88 F.Supp. 408 (D. N.D. 1950).

94. McBaine, *Jurisdiction Over Foreign Corporations: Actions Arising Out of Acts Done Within the Forum*, 34 Calif. L. Rev. 331, 332 (1946).

95. This is the so-called "solicitation plus" rule, a famous old standby in the field of corporate law.

standards implied in the due process clause.[96] There is thus no mechanical or quantitative test which can be applied; the inquiry is simply whether "fair play and substantial justice" indicates that the corporation can reasonably be required to respond to the process. In this connection "An 'estimate of the inconveniences' which would result to the corporation from a trial away from its home or principal place of business is relevant. . ."[97]

This does not mean that the old rule to the effect that a corporation is not amenable to the jurisdiction of a state unless its activities amount to "solicitation plus" has gone by the boards completely; the precedents dealing with service under the former rule still retain a high degree of relevance in determining whether "fair play and substantial justice" will be served by upholding the effectiveness of process issued against a foreign corporation. The North Dakota cases have turned, for the most part, on the "solicitation plus" test, and these precedents undoubtedly still represent the law even after the change in the position of the United States Supreme Court.

The most striking local decision is *Wheeler v. Boyer Fire Apparatus Co.*,[98] decided in 1933. This case held that when a foreign corporation employed a salesman to systematically solicit orders which resulted in a "continuous flow" of shipments into the state, service might be made on the corporation by delivering a summons to the salesman, so long as the cause of action arose within North Dakota. The opinion appears to go as far in upholding the jurisdiction of the North Dakota courts as is constitutionally permissible, and the federal district court of North Dakota has commented that the decision actually involved a set of facts in which more than mere solicitation was present, since the salesman was authorized "to make settlement in the name of the foreign corporation and . . . to promptly make collections."[99] The syllabus of the court in the *Wheeler* case, however, announced its holding without reference to these factors.

In *Ellsworth v. Martindale-Hubbell Law Directory*,[100] the Court found the problem which confronted it somewhat less difficult to resolve. This was an action for libel by an attorney who made service upon the foreign corporation by delivering the summons

96. International Shoe Co. v. State of Washington, 326 U.S. 310 (1945).
97. 326 U.S. at 317.
98. 63 N.D. 403, 248 N.W. 521 (1933).
99. See Anderson v. Page & Hill Homes, 88 F.Supp. 408, 411 (D. N.D. 1950).
100. 65 N.D. 297, 258 N.W. 486 (1935).

to a salesman within this state. Since the duties of the salesman were not confined to mere solicitation, but also included gathering information intended for ultimate use in the directory, the Court quite logically took the position the defendant was doing business here, since it was engaged in securing a part of its stock in trade. Justice Nuessle added that, "It is clear that the mere solicitation of business within a state by an agent for a foreign corporation does not constitute engaging in business so as to make the corporation present there in the sense that is essential to a valid service upon it."[101] This statement, of course, somewhat weakens the force of the *Wheeler decision.*

One significant change which Rule 4 (d) (4) makes in the present law is the elimination of the requirement found in the existing statutes that where service is made upon a foreign corporation the cause of action must have arisen in the state or the corporation must have property here.[102] This would appear to broaden the possibilities of suits against foreign corporations in the state, but how far the new rule can be pushed in the face of the current Supreme Court doctrine is doubtful.

(e) *Personal Service Outside the State.* Personal service[103] outside the state may be made:

(1) In any action, upon an individual over the age of 18 years who is domiciled in this state, by delivering a copy of the summons to him personally.[104]

(2) In any action, upon a person domiciled in this state, other than a natural person, by delivering a copy of the summons in the manner provided by this rule for personal service upon such person in this state.[105]

(3) When any natural person or persons not residing in this state shall engage in business in this state, in any action against such person or persons arising out of such business, by delivering a copy of the summons to the person who at the time of service is in charge of any business in which the defendant or defendants are engaged within this state, if there is such, and such service shall be of the same force and effect as if served personally within the state upon the said defendant

101. *Id.* at 302-03, 258 N.W. at 488.

102. The requirement is neatly illustrated by Brevick v. Cunard S.S. Co., 63 N.D. 210, 247 N.W. 373 (1933). The plaintiff purchased a ticket in North Dakota for transportation to France and then Norway. The defendant did not permit his to disembark in France. It was held the cause of action had not arisen in this jurisdiction since the breach of contract had occurred in France.

103. The superseded statutory provision is N.D. Rev. Code §28-0616 (1943). No comparable provision is found in the Federal Rules.

104. This is new. Possibly it may be regarded as superseding N.D. Rev. Code §28-0621 (1943), though the Joint Committee does not list it as doing so. See the text discussion *infra.*

105. The superseded statutory provision is N.D. Rev. Code §28-0606 (1943). No comparable provision is found in the Federal Rules.

or defendants so engaging in business in this state provided that a copy of such summons together with a notice of such service upon such persons in charge of such business pursuant to the provisions of this subsection shall be sent forthwith to such nonresident person or persons by registered return receipt requested mail. The plaintiff shall file with the clerk of the district court in which such action is pending an affidavit of compliance herewith, a copy of the summons and either a return receipt purporting to be signed by the defendant or defendants, or person qualified to receive his or their registered mail in accordance with the rules and custom of the postoffice department; or if acceptance was refused by the defendant or defendants or his or their agent, an affidavit by or on behalf of the plaintiff that notice of such mailing refusal was forthwith sent to the defendant or defendants by ordinary mail. The foregoing papers shall be filed within 30 days after the return receipt or other official proof of delivery or the original envelope bearing the notation of refusal, as the case may be, is received by the plaintiff. Service of process shall be complete 5 days after such papers are filed.

Service may also be made by delivering a copy of the summons with the person who at the time of service is in charge of the business of any such nonresident defendant or defendants within this state and by delivering a copy thereof to the defendant or defendants personally pursuant to subdivision (c) (2) of this rule. Proof of such personal service shall be filed with the Clerk of Court and service shall be complete five days after proof therof is filed.

If there is no person within the state in charge of any business of the defendant or defendants, then service may be made pursuant to the provisions of subdivision (c) (2) of this rule.[106]

A. *Domicil as a basis of jurisdiction.* Rule 4 (e) (1) adopts specifically the rule of the famed case of *Milliken v. Meyer*,[107] decided in 1940 by the United States Supreme Court. In that case, a plaintiff sued a defendant domiciled in Wyoming, the action being brought in the Wyoming court. Service of process was made personally on the defendant in the state of Colorado, and was upheld as valid. The opinion has been expressed that under the provisions of the code a similar service could be made which the North Dakota courts would accept as sufficient.[108] The North Dakota Supreme Court has laid it down that in an action where

106. This is new material. See the text discussion *infra*.
107. 311 U.S. 457 (1940).
108. See Gronna, *Domicil of Absent Defendant Is a Basis for in Personam Jurisdiction*. 24 N.D. Bar Briefs 4 (1948). Judge Gronna based his argument to the effect that *Milliken v. Meyer* was in force in this state on N.D. Rev. Code §§28-0620 and 28-0621 (1943). This is the reason for the comment in note 104.

a personal judgment for money is sought, the defendant "must be brought within the jurisdiction of the court by service of process *within the state*, or by his voluntary appearance in the action," or the judgment will be violative of the due process clause.[109] This decision, however, did not involve out-of-state service on a domiciliary and was handed down before *Milliken v. Meyer* was decided. There thus seems little doubt that Rule 4 (e) (1) is constitutional.

B. *Service on agents.* Rule 4 (e) (3) appears to be unclear in its language, though the intent is plain enough. In 1935 the United States Supreme Court ruled in *Henry L. Doherty & Co. v. Goodman*[110] that an individual living in New York but carrying on business in the state of Iowa through an agent could be subjected to the jurisdiction of the Iowa courts through service of process on the agent in Iowa, where the cause of action involved grew out of the business transacted in Iowa. Rule 4 (e) (3) was plainly meant to adopt the rule of that case. Read literally, however, the rule would appear to say that one could make service of process on the agent outside the state.[111] If it was the intention of the Joint Committee to so provide, it seems doubtful that the rule could be considered valid.[112] Thus, if A is agent of P, and is served with North Dakota process in Minnesota, it would seem clear that P could not be considered bound by such service. Conversely, if A is served with process in North Dakota in a case arising out of A's activities on behalf of P in this state, Rule 4 (e) (3) makes it clear that P is bound by such service.

One interesting question arises when one considers the possibility that the agent might be domiciled in this state. In such a situation, is service upon him outside the state pursuant to the provisions of Rule 4 (e) (1) also binding on the principal? There seems no logical reason why an affirmative answer should not be given.

> (f) *Other Service.* Whenever a statute of this state or an order of the court provides for the service of a summons or a notice or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service

109. Darling & Co. v. Burchard, 69 N.D. 212, 284 N.W. 856 (1939), syll. 7.
110. 294 U.S. 623 (1935).
111. Note that the introductory sentence of rule 4 (e) states that personal service "outside" the state may be made as provided in rule 4 (e) (3). At the same time, the language of rule 4 (e) (3) itself is ambiguous. It states that service may be made by delivering a copy of the summons to an agent in charge of business "within this state." An agent may be in charge of business "within this state" though living in another jurisdiction.
112. See Restatement, Judgments 79 *et seq.* (1942), and particularly Restatement, Judgments §22 (1942), containing a clear discussion of this subject matter.

shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.[113]

This is plainly a mere catch-all provision, designed to make it plain that the North Dakota Rules of Civil Procedure do not supersede other methods of service prescribed by other sections of the code.

(g) *Service by Publication; When Permitted.*

(1) The summons may be served upon any defendant by publication in the following cases:

1. When the defendant is not a resident of this state;

2. When the defendant is a foreign corporation, joint stock company, or association, and has no agent or other person in this state upon whom personal service can be made;

3. When the defendant is a domestic corporation which has forfeited its charter or right to do business in this state or has failed to file its annual report as required by law;[114] or

4. When personal service cannot be made upon such defendant in this state to the best knowledge, information, and belief of the person making the affidavit mentioned in subdivision (g) (2) of this rule, and such affidavit is accompanied by the return of the sheriff of the county in which the action is brought, stating that after diligent inquiry for the purpose of serving such summons he is unable to make personnal service thereof upon such defendant.[115]

(2) *Filing of Complaint and Affidavit for Service by publication.* Before service of the summons by publication is authorized in any case, there shall be filed with the clerk of the district court of the county in which the action is commenced a complaint setting forth a claim in favor of the plaintiff and against the defendant and also an affidavit stating one of the grounds for service by publication specified in subdivision (g) (1) of this rule and also stating the place of defendant's residence, if known to the affiant, and if not known, stating that fact, and also stating, unless the complaint shows:

1. That the defendant has property within this state or debts owing to him from residents thereof;

2. That the defendant is a resident of this state and has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself secreted therein with a like intent;

3. That the relief sought in the action consists wholly or partly in excluding the defendant from any interest in or lien upon specific real or personal property within this state, or

113. No statute is listed by the Joint Committee as superseded by this rule.

114. The phrase "or has failed to file its annual report as required by law" was added by the list of amendments submitted to the North Dakota Supreme Court by the Joint Committee on June 17, 1955.

115. The superseded statutory provision is N.D. Rev. Code §28-0620 (1943), which is identical to this rule in every respect save that mentioned in note 114.

in enforcing, regulating, defining, or limiting such interest or lien in favor of either party to the action or otherwise affects the title to such property;

4. That the action is for divorce or for a decree annulling a marriage; or

5. That the defendant, although a resident of this state, has been continuously absent from the state for more than sixty days.[116]

The language of the foregoing provisions is derived almost entirely from provisions of the North Dakota Revised Code of 1943 now on the books. They thus represent virtually no change in the law of North Dakota on the procedure to be followed in making service by publication.

The cases involving service by publication usually involve attacks upon the affidavit for publication required by the second subdivision above. It is clear that this affidavit must be made in strict conformity to the statute,[117] and that similarly the various steps specified by the statute must be taken precisely as the statute requires; even minor variations are in many cases sufficient to invalidate the service. Thus, it is a jurisdictional defect if actual publication of the summons is commenced before the affidavit for publication has been filed with the clerk of court.[118] The same thing is true of the sheriff's return of service.[119] Likewise, when the affidavit for publication states that the defendant's "post office address"[120] or "whereabouts"[121] is unknown, it is insufficient; the statute requires a statement that the place of the defendant's *residence* is not known in cases where such is the fact and is not concerned with post office addresses or approximate locations. Where the affidavit sets forth the place of the defendant's residence specifically, an allegation that he is a non-resident of the state is of course redundant and unnecessary.[122]

A puzzling case is *Dallas v. Luster,*[123] decided in 1914. In that case the affidavit for publication of the summons was made by the attorney and asserted the non-residence of the defendant merely upon the belief of the attorney. "No attempt was therein made,

116. The superseded statutory provision is N.D. Rev. Code §28-0621 (1943), which is identical to this rule in every respect.
117. See Roberts v. Enderlin Investment Co., 21 N.D. 594, 599-600, 132 N.W. 145, 147 (1911).
118. Jablonski v. Piesik, 30 N.D. 543, 153 N.W. 274 (1915).
119. Roberts v. Enderlin Investment Co., 21 N.D. 594, 132 N.W. 145 (1911).
120. Hughes v. Fargo Loan Agency, 46 N.D. 26, 178 N.W. 997 (1920); Jablonski v. Piesik, 30 N.D. 543, 153 N.W. 274 (1915); Atwood v. Tucker, 26 N.D. 622, 145 N.W. 587 (1914).
121. Krumenacker v. Andis, 38 N.D. 500, 165 N.W. 524 (1917).
122. Klem v. Loiland, 59 N.D. 18, 228 N.W. 420 (1929).
123. 27 N.D. 450, 147 N.W. 95 (1914).

even upon information and belief, to show that the plaintiff himself had no knowledge of the defendant's place of residence or address. There was in it no proof or even any statement of any effort, either on the part of the attorney or of his client, to ascertain her whereabouts."[124] The court thought that this brought it about that the provisions of the statute had been "totally ignored," and invalidated a judgment based on service supported by the affidavit. The inference would seem to be that the client should sign the affidavit for publication,[125] but the court has upheld affidavits for publication signed by the attorney rather than the client[126] in the past and it seems to be the customary practice for the attorney to sign them.

It will be noted that in the main service by publication is permitted only in cases where the court is exercising jurisdiction in rem. Thus, subdivisions 1, 3 and 4 of Rule 4 (g) (2) clearly contemplate only in rem jurisdiction in the case they cover.[127] Subdivisions 2 and 5, however, allow service by publication in cases where the defendant is a "resident" of the state. They should be read in connection with Rule 4 (e) (1).[128]

> (3) *Number of Publications.* Service of the summons by publication may be made by publishing the same three weeks, once in each week for three successive weeks, in a newspaper published in the county in which the action is pending, if a newspaper is published in such county, and if no newspaper is published in such county then in a newspaper published in an adjoining county and having a general circulation in such county.[129]

This particular subdivision of Rule 4 (g) is, once again, merely a carry-over of statutory language into the new rules without substantial change. As noted in the comment to the preceding sections, if publication is commenced prior to the filing of the affidavit for publication and the filing of the sheriff's return, the service is invalid.[130]

> (4) *Mailing Summons and Complaint.* A copy of the summons and complaint, at any time after the filing of the

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124. *Id.* at 453, 147 N.W. at 96.
125. The case uses this language: "The affidavit for publication of the summons was altogether insufficient. It was made by the attorney for the plaintiff, and went merely to the extent of the knowledge of that attorney." *Id.* at 453, 147 N.W. at 96.
126. Klem v. Loiland, 59 N.D. 18, 228 N.W. 420 (1929).
127. Causes of action for divorce or annulment normally are considered to be actions quasi in rem.
128. See the discussion of domicil as a basis for jurisdiction following rule 4 (e).
129. The superseded statutory provision is N.D. Rev. Code §28-0622 (Supp. 1953). This rule is merely a restatement of that provision.
130. Jablonski v. Piesik, 30 N.D. 543, 153 N.W. 274 (1915).

affidavit for publication and not later than ten days after the first publication of the summons, shall be deposited in some post office in this state, postage prepaid, and directed to the defendant to be served at his place of residence unless the affidavit for publication states that the residence of the defendant is unknown.[131]

(5) *Personal Service Outside State Equivalent to Publication.* After the affidavit for publication and the complaint in the action are filed, personal service of the summons and complaint upon the defendant out of the state shall be equivalent to and shall have the same force and effect as the publication and mailing provided for in this chapter.[132]

(6) *Time When First Publication or Service Outside State Must Be Made.* The first publication of the summons, or personal service of the summons and complaint upon the defendant out of the state, must be made within sixty days after the filing of the affidavit for publication. If not so made, the action shall be deemed discontinued.[133]

(7) *When Service by Publication or Outside State Complete.* Service by publication is complete upon the expiration of fifteen days after the first publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, upon the expiration of fifteen days after the date of such service.[134]

(8) *When Defendant Served by Publication Permitted to Defend.* The defendant upon whom service by publication is made, or his representative, on application and sufficient cause shown at any time before judgment, shall be allowed to defend the action. Except in any action for divorce, the defendant upon whom service by publication is made, or his representative, upon making it appear to the satisfaction of the court by affidavit, stating the facts, that he has a good and meritorious defense to the action, and that he had no notice or knowledge of the pendency of the action so as to enable him to make application to defend before the entry of judgment therein, and upon filing an affidavit of merits, may be allowed to defend at any time within three years after entry of judgment on such terms as may be just. If the defense is successful, and if the judgment or any part thereof, has been collected or otherwise enforced, such restitution thereupon may be compelled as the court directs, but the title to property sold under such judgment to a purchaser in good faith shall not be affected thereby. Any defendant who shall have received a copy of the summons in the action mailed to him as provided in subdivision (g) (4) of this rule, or upon whom the summons shall have been personally served out of the state, as provided

131. This supersedes but does not materially alter N.D. Rev. Code §28-0623 (1943).
132. The superseded statutory provision is N.D. Rev. Code §28-0624 (1943).
133. N.D. Rev. Code §28-0625 (1943) is the superseded statutory provision.
134. N.D. Rev. Code §28-0626 (Supp. 1953) is the superseded statutory provision.

in subdivision (g) (5) of this rule, shall be deemed to have had notice of the pendency of the action and of the judgment entered therein.[135]

(9) *Additional Information to be Published.* In all cases where publication of summons is made in an action in which the title to, or any interest in or lien upon real property is involved or affected or brought into question, the publication shall also contain a description of the real property involved, affected or brought into question thereby, and a statement of the object of the action.[136]

With the exception of subdivision (9), the foregoing provisions of Rule 4 (g) are all in substance statutes preserved from the code without material change. It will be noted that Rule 4 (g) (5) presents an alternative method of making service of process outside the jurisdiction. The practitioner making use of this provision should be careful to proceed as prescribed by the statutes regulating the service of summons by publication up to the point where actual publication of the summons would confer jurisdiction. A defect which would invalidate service of the summons by publication would obviously invalidate service under Rule 4 (g) (5).[137]

It is also to be noted that Rule 4 (g) (8) contains at least one provision which would appear to be of substantive, rather than procedural, import. This is the provision that when title to property which has been the subject of an action commenced by constructive service has passed into the hands of a bona fide purchaser, the title is not affected by a vacation of the judgment occurring thereafter. The provision has been carried over from the Code and its status would appear, at first glance, anomalous in the Rules. If the Rules come into force, the statute will have been superseded and thus, presumptively, of no further effect. But can a set of rules devoted to procedural issues prescribe when and under what conditions a purchaser of real property can acquire an indefeasible title?[138]

Rule 4 (g) (9) is new material of obvious worth. It is intended to make the publication of a summons meaningful and it may, in certain circumstances, enable a judgment founded on such publica-

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135. This restates N.D. Rev. Code §28-0627 (1943).
136. This provision is new. See text discussion, *infra*.
137. As illustrated by the case of Johnson v. Engelhard, 45 N.D. 11, 176 N.W. 134 (1920).
138. The answer would seem to be that while the statute involved has been superseded from a procedural standpoint, it retains any substantive effect it might have possessed; hence the particular provision involved would appear to remain good law.

tion to withstand an attack based on the due process clause where unknown claimants to real property are involved.[139]

(h) *Amendment.* At any time, in its discretion, and upon such notice and terms as it deems just, the court may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.[140]

A discussion of the operation of this rule has already appeared in the comment to Rule 4 (a), and need not be repeated here.

(i) *Proof of Service.* Proof of the service of the summons and of the complaint or notice, if any, accompanying the same must be as follows:

(1) If served by the sheriff or other officer, his certificate thereof;

(2) If by any other person, his affidavit thereof;

(3) In case of publication an affidavit made as provided in section 31-0406 and an affidavit of the deposit of a copy of the summons and complaint in the post office as required by law, if the same shall have been deposited; or

(4) The written admission of the defendant showing the time and place of service.

The certificate or affidavit of service mentioned in subsections 1 and 2 must state the time, date, place, and manner of service.[141]

Rule 4 (i) is of obvious importance. It prescribes the method of establishing for the record the jurisdictional foundation of a plaintiff's case, and several decisions have been handed down by the North Dakota Court concerning its subject matter.

The general rule of the common law was that the sheriff's return of service was conclusive and could not be impeached. In this state, however, the common law rule has been abolished. The Code contains a provision to the effect that the sheriff's return of service is prima facie evidence,[142] which negatives the idea the return can be considered conclusive. And the Court itself has disapproved, by way of dictum, the "strict rule" of the common law regarding non-impeachability of the return.[143] In cases involving an affidavit of service by private individuals, the same result follows quite

139. *Cf.* Fenton v. Insurance Co., 15 N.D. 365, 109 N.W. 363 (1906).
140. The superseded statutory provision is N.D. Rev. Code §28-0632 (1943). Fed. R. Civ. P. 4 (h) is identical.
141. The superseded statutory provision is N.D. Rev. Code §28-0628 (1943). The comparable provision in the Federal Rules is Fed. R. Civ. P. 4 (g).
142. N.D. Rev. Code §11-1516 (1943).
143. See Odland v. O'Keeff Implement Co., 59 N.D. 335, 339, 229 N.W. 923, 924 (1930).

logically, The affidavit may be impeached as to its factual content,[144] or as to its legal sufficiency,[145] and this has often been done.

> (j) *Contents of Affidavit of Service.* Whenever a process, pleading, order of court, or other paper is served personally by a person other than the sheriff or person designated by law, the affidavit of service, when made, shall state that the person so serving is of legal age and the date and place of making the service. It shall also state that the person making such service knew the person served to be the person named in the papers served and the person intended to be served.[146]

The case law against which this rule must be considered is set forth in the comment to the preceding section. It makes no change in the law of North Dakota.

(To Be Continued)

144. Baird v. Ellison, 70 N.D. 261, 293 N.W. 794 (1940); Odland v. O'Keeffe Implement Co., 59 N.D. 335, 229 N.W. 923 (1930); Beery v. Peterson, 58 N.D. 273, 225 N.W. 798 (1929).
145. Marin v. Potter, 15 N.D. 284, 107 N.W. 970 (1906).
146. The superseded statutory provision is N.D. Rev. Code §28-0629 (1943).

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